6-25-1976

Charles V. Parker, Sr. v, Charlie Murphy, etc.

Appellee's Brief 1976-SC-0395

APPELLEE'S BRIEF

559 S.W 2d 486

SUPREME COURT OF KENTUCKY

FILE NO. 76-395

CHARLES V. PARKER, SR., ... APPELLANT

VS.

CHARLIE MURPHY, ETC., ... APPELLEE

APPEAL FROM SCOTT CIRCUIT COURT
HON. ROBERT HALL SMITH, JUDGE

BRIEF FOR APPELLEE

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Service of the within brief has been served on counsel for Appellant, Hon. Marion Rider, 202 St. Clair Street, Frankfort, Kentucky 40601, and Honorable Robert Hall Smith, Judge Scott Circuit Court, Scott County Courthouse, Georgetown, Kentucky 40324, on this 24 day of June, 1976.

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment of the Scott Circuit Court granting appellee a Summary Judgment in an action in which plaintiff sought to recover his real estate brokerage commission due pursuant to a written contract with the appellant for the sale of certain land of the appellant. The Scott Circuit Court ruled that the appellee should recover from the appellant the sum of $2,910.00, representing the commission due, with interest and costs.

The appellee, Charlie Murphy d/b/a Charlie Murphy

Real Estate, was, and still is, a duly licensed real estate broker and a member of the Lexington Board of Realtors, Inc., which provides a multiple listing service (hereinafter referred to as MLS). The appellant, Charles V. Parker, Sr. owned as joint tenant with his wife a tract of land seven miles Northwest of Stamping Ground, Kentucky, in Franklin County, containing approximately 188 acres.

In Georgetown, Scott County, Kentucky, on March 4, 1973, the appellant and appellee entered into a MLS Sales Agency Contract for farm property whereby the appellant employed the appellee to sell the abovementioned property. This standard form contract provided that in consideration of the appellee listing the property for sale on the Lexington MLS and using his best efforts to find a purchaser the appellant granted to the appellee the "exclusive right and privilege" for 120 days to sell the described property for the price of $50,000.00.

This contract further provided, as do all Lexington MLS farm property contracts used in the Central Kentucky area, that:

> If said property is sold before the expiration of this agreement by myself or any other person, I agree to pay you a commission of 6% of the selling price; or if it is sold by me, without the services of a Realtor within three months after such expiration to any person with whom you or I have had negotiations during the period of this listing, I agree to pay

> you the aforementioned commission. In the event of such sale, I will execute and deliver to said purchaser a deed for said property with usual full covenants of warrant.

During the 120 day period of the contract appellee placed "for sale signs" on the property, listed the property for sale in several local newspapers, and showed the property to several prospective purchasers. (Dep. Parker, Q 58, 62, 111-113, 141) This is contrary to the implication of the unequivocal statement made on page 2 of Appellant's Brief that "[t]he appellee did not find or present a purchaser for the property during the 120 listing day period."

According to the Affidavit of Shirley W. Southworth, the following negotiations occurred during the month of May, 1973:

> In May, 1973, . . . we went out to the farm, *I asked Mr. Parker if the farm was for sale. He said yes, and priced it to me at* $50,000, but he said that J. L. Murphy had a contract to sell the farm but he thought his contract was out and that if it was out, *he might take* $48,500 *for the farm.* I was interested in helping Mr. Craig buy a farm.
>
> Several days later, I called Charles Parker and told him that I did not know what Craig was going to do. I told him that Mr. Craig could not make up his mind . . . *I told Charles Parker that I might buy the farm if I could get the money,* the next day I went down and left a check with

> Mrs. Parker for $1,000 to pay the pasture rent. The check was dated *May* 31, 1973.
>
> Later about the middle of July, 1973, I saw Mr. Parker and offered him $48,500.00 for the farm if I could finance it, and he said he would take it. Such was the first and only offer I made Mr. Parker for the farm. Prior to such time I had had no negotiations with Mr. Parker about buying the farm. I had only asked him what he wanted for it, and he only told me his price. We closed the sale on July 30, 1975. (R.18) (Emphasis added).

The events that occured during this 120 day period as depicted by the appellant in his Affidavit are substantially the same as in the Affidavit of Shirley W. Southworth although they seem somewhat less accurate:

> . . . About the middle of May, 1973, I met Shirley Southworth at Carl Oliver's farm near Elmville. He was looking for pasture. We went up and looked at the grass on the farm. In the course of our conversation, Mr. Southworth asked me if the farm was for sale. I told him that it was. I told him it was priced at $50,-000.00. I told him that J. L. Murphy had had a contract to sell it but I thought his contract was up and if the contract was up, I might take $48,-500.00 for the farm. He said that he might be interested in buying the farm for David Craig, if they could finance it.

> Several days later Mr. Southworth called me and said that he did not know what Craig was going to do; that he had to have pasture. I agreed to let him have for pasturage my home place containing about 140 acres for $1,000.00. About a week later he left a check for $1,000.00 with my wife for pasture. He obtained no pasturage on the 188 acre tract. (R.16)

Although the Affidavits of Shirley W. Southworth and appellant recite the closing date of the sale of the 188 acre tract as July 30, 1975, and July 30, 1974, respectively, it is uncontroverted that the sale was closed on July 30, 1973 as evidenced by the deed of record (Deed Book 253, Page 228) filed in the Franklin County Court Clerk's Office. (R.4) Therefore, the sale was made by the appellant within the three-month "extension" period following the "expiration of listing" period.

In essence, appellant negotiated with Charles W. Southworth for the sale of the 188 acre farm during the 120 day listing period. Appellant made it clear that he would sell the farm to Mr. Southworth for less money ($48,500.00 rather than $50,000.00, as listed) once the exclusive right to sell contract with appellee had expired. (R.18) The farm was sold to Mr. Southworth only 28 days after the expiration of the listing period which was well within the three month extension period. This is the basis for this present action; therefore, on October 3, 1973, the appellee filed suit which resulted in a Summary Judgment, the subject of this appeal.

ARGUMENT

Appellee contends that the Scott Circuit Court did not err in granting Summary Judgment for appellee and that this Judgment should be affirmed based upon the following reasons:

THE SUBJECT MLS SALES AGENCY CONTRACT IS A VALID AND ENFORCEABLE CONTRACT.

The real controversy concerning the validity of this contract centers around the provision which requires that a commission be paid:

> . . . if it is sold by . . . (the appellant) within three months after such expiration to any person with whom you or I have had negotiations during the period of this listing . . . . (R.3)

Appellant called this provision "unusual" (Appellant's Brief, at 1) and furthermore inferred that the provision is invalid because "[m]y research discloses no case in which any Court has considered or sustained a recovery by an agent on the basis of such inserted language." (Appellant's Brief, at 9). Appellant, relying on a note in 27 A.L.R.2d 1341 (1953), argues that appellee is not entitled to a commission because he has not been, in the words of the cases cited therein, the "procuring cause." Therefore, appellant concludes that:

> . . . under such language, the agent undertakes to create, without any consideration, a new right to a commission not predicated upon his efforts in the sale of his property; but, rather,

> predicated upon a new situation independent of any effort of his to sell the property. (Appellant's Brief at 10).

This unremarkable argument is neither logical nor applicable to the case at bar. First, a contract is not invalid simply because a similar contract was not the subject of an appellate opinion as reported in a 1953 printing of A.L.R. Second, the entire matter of the construction of these contracts was re-examined in 1973 and noted in 51 A.L.R.3d 1149.

The contract provision which is the subject of the present controversy cannot be measured by comparison with other contracts; they simply are not the same.

> Not only has the variety of such terminology led to difficulties in definition and construction -- and to problems of application in differing factual settings -- but the very fact of such variety has made it virtually impossible for the courts to arrive at any fixed standard of measurement by which to judge the sufficiency to the requirements of an extension clause. 51 A.L.R. 3d at 1156.

Therefore, it would be error to judge the sufficiency of the present contract by an inappropriate standard as suggested by appellant. The Commentator for A.L.R. has suggested the following standard which is consistent with accepted practice in the construction of any contract.

> Hence, it would seem clear that as with other writings, the specific and peculiar words and

> phrases of each individual extension clause must be analyzed and interpreted in the light of their usual and ordinary meaning and of the purpose of the clause itself, that they must be read in connection with the entire contract of which such clause forms a part, and that they must be fairly and reasonably construed with a view to ascertaining and effectuating the intensions of the parties. 51 A.L.R.3d at 1155.

Contrary to the conclusions drawn by appellant, the broker's efforts and action do *not* have to be the procuring cause of the sale of the listed property in order to be entitled to the commission. *Galbraith* v. *Johnston,* 92 Ariz. 77, 373 P. 2d 587; *Wright & Kimbrough* v. *Dewees,* 52 Cal. App. 42, 197 P. 957; *Moore* v. *Holeman Real Estate Co.,* 129 Ark. 465, 196 S.W. 479.

In upholding a directed verdict for the broker, the court in *Moore* v. *Holeman Real Estate Co.,* 129 Ark. 465, 196 S.W. 479, pointed out that it was by design that the contract did not mention procuring cause because the parties wanted to eliminate that troublesome question in the event a dispute over commissions should arise.

> [I]t is also well recognized that the parties to a brokerage contract may make the broker's right to compensation depend upon any conditions which they may see fit to impose so long as such conditions are not unlawful or contrary to public policy. 51 A.L.R.3d at 1154.

The appellant has not argued that the conditions of

the subject contract are unlawful or contrary to public policy and simply being "unusual" gives no grounds for reversal on appeal. Furthermore, the subject contract, taken as a whole, serves to protect the legitimate interests of both the landowner and the listing broker. Because the extension period is expressly a stated time, there can be little doubt on the part of the landowner as to his obligation to the broker. The stated period of time avoids the problem that a court may experience in determining what is a reasonable protective period. In *Messick* v. *Powell*, 314 Ky. 805, 236 S.W.2d 897, the Court of Appeals held that the broker was entitled to a commission even though the contract had no express extension clause.

The broker is probably afforded more protection than the landowner, however, this seems rightly so considering the effort and expenditures the broker must make without any guarantee of a sale and the subsequent commission. The landowner takes no risk except that his land may not be sold during the period of the listing contract. On the other hand, the broker takes all the risks. He must pay for the maintenance of the MLS, advertise the property in the local newspapers and through signs, and take prospective buyers to view the property. All of this takes time and money and the broker is offered no protection except through the sales agency contract.

This type of contract is designed to protect the broker from exactly the situation which occurred in the case at bar; that is, where the landowner and a prospective pur-

chaser agree to wait until the expiration of the listing contract to close the sale without the broker. By doing this they can split the broker's commission and both save money.

THE SUBJECT CONTRACT IS SUPPORTED BY ADEQUATE CONSIDERATION.

Owners/sellers have historically challenged the validity of exclusive listing contracts by alleging the contract lacked valid consideration. The appellant also has joined the historical bandwagon and challenged the validity of the protective clause on those grounds. Since 1909, when the Kentucky Court of Appeals summarily dismissed the lack of consideration argument in *T. M. Gilmore & Co.* v. *W. B. Samuels,* 135 Ky. 706, 123 S.W. 271, the Kentucky Court has consistently held that an agreement to list property for sale and to use efforts to find a purchaser constituted valid consideration for the contract, even where the consideration was not written into the sales contract. *Carter v. Hall,* 191 Ky. 75, 229 S.W. 132; *Messick* v. *Powell,* 314 Ky. 805, 236 S.W.2d 897.

In the case at bar the consideration is expressly written into the contract in clear and unequivocal language

> In consideration of your agreement to list the property for sale and place this listing on the Multiple Listing Service of the Lexington Board of Realtors, Inc., and to use your efforts to find a purchaser, I hereby grant you the exclusive right and privilege . . . . (R.3)

Appellant singles out the extension clause in his argument of lack of consideration. This is erroneous in yet another aspect. The Kentucky Court of Appeals has held that "[i]t is not necessary that each clause of a contract carry with it a specific consideration. It is sufficient if the overall agreement has a consideration." *Hamrick* v. *City of Ashland,* Ky. 321 S.W.2d 401, 403. There can be no doubt that the exclusive sales contract taken as a whole, was with consideration as the Kentucky courts have consistently held that an agreement to list property for sale and to use efforts to find a purchaser constituted valid consideration for the contract.

Appellee, or any broker for that matter, cannot guarantee that he can sell the property in consideration of listing it for the landowner. This would clearly be an unreasonable burden on the broker. The broker can, however, promise to use his best efforts to sell the property but he should have every reason to expect the landowner to refrain from frustrating that promise. Appellant has confused the promises of the broker with the landowner. Implicit in the extension clause is the promise by the landowner that he will not frustrate the efforts of the broker to sell the property. If the landowner breaches this promise he must pay the broker his commission just as though the broker had found the purchaser. What reasonable purchaser would even consider dealing with a broker once the owner has said, "I told him that . . . (the broker) had had a contract to sell it but I thought his contract was up and if the contract was up, I might take . . . (less) for the farm." (R.16)

IT IS NOT MATERIAL THAT THE WIFE DID NOT SIGN THE CONTRACT AS A JOINT TENANT OR A TENANT BY THE ENTIRETY

The reliance by appellant upon KRS § 371.010(8) as a basis for reversal is without precedent or merit. That section only provides that no action shall be brought to charge any person upon any contract for any commission for the sale of real estate unless the contract be in writing and signed by the party to be charged therewith. This action was against the appellant, Charles V. Parker, and not his wife, June Louise Parker. It is not material in this instance that the wife, a joint owner with right of survivorship, did not sign the exclusive listing contract. A Kentucky Court of Appeals case that supports this general proposition is *Hurt* v. *Sands Co.*, 236 Ky. 729, 33 S.W.2d 653 (1930), which denied recovery of commission to a broker when he knew that the owner could not perform without the wife jointly and knew that the wife did not intend to join. Appellee, under the present circumstances did not know or have reason to know that appellant's wife did not intend to join. Furthermore, appellant's argument is moot in this respect as his wife did not refuse to join in selling the property on July 30, 1973. Appellant completely ignores even part of the quoted opinion of the *Hurt* case used in his own brief, that is, *"if the deal fails by reason of such facts, circumstances or conditions."* It is uncontested that the deal did not fail. Appellant's wife did in fact join in signing the deed to convey the property to Mr. Southworth.

Appellant erroneously relies on *Renick* v. *Mann*, 19

Ky. 251, 238 S.W. 763, for the same proposition. Even more remarkable, the *Renick* case lays down the Kentucky rule which is diametrically opposed to the appellant's argument. The Court there cited from *Womack* v. *Davis*, 157 Ky. 716, 163 S.W. 1130, where they said:

> It is well settled that a party who makes a contract like this is liable for the whole of the compensation agreed to be paid, although he did not own the land he placed with the broker for sale, or only owned an interest in it, and was unable to carry out his contract because he did not own it, or because the other owners would not consent to the sale, although there might be an exception to this rule if the broker had knowledge of the fact that the person making the contract was not authorized to do so.

The weight of authority supports this proposition as expressed in 10 A.L.R.2d 665, § 5 (1950). Courts in other jurisdictions who have decided this exact issue hold that the broker's right to be paid his commission is not defeated by the failure of a wife to sign the sales contract.

THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE CONTRACT PERIOD WAS FOR 60 OR 120 DAYS.

Appellant argues that there is a genuine issue of material fact and that therefore the Scott Circuit Court erred in granting a Summary Judgment.

> Notwithstanding, the lower Court made no finding of fact as to the term of the contract, appar-

> ently ignoring such issue of fact and assumes that the period of the contract was "120 days" from March 4, 1973, (sic). Apepllant's Brief at 11.

Appellant has no grounds upon which to make such an argument. Since the Summary Judgment of the Scott Circuit Court did not state any findings of fact or conclusions of law as they are not required pursuant to CR 52.01, appellant cannot say whether the matter was determined or ignored.

Furthermore, at no time did appellant raise this issue in a manner that would afford the trial judge an opportunity to rule in his favor. After raising the issue in his objection to Motion for Summary Judgment, appellant never mentioned it again in the several memoranda which followed; but rather, he dismissed the issue much like he has done on the present appeal. "It is our contention that appellee did not negotiate with Mr. Southworth for the sale of the farm during the listing period in the contract -- whether the contract was for 60 days or 120 days." Appellant's Brief at 12.

THE CONDITIONS OF THE CONTRACT WERE MET; THEREFORE, THE APPELLANT IS LIABLE FOR THE APPELLEE'S BROKERAGE COMMISSION.

There are several cases, although not cited from this jurisdiction, annotated in 51 A.L.R.2d 1149, § 8 (1973) which address the point of "negotiations;" however, appellant has relied upon *Munson* v. *Furrer*, 261 Wis. 634,

53 N.W.2d 697 (1952) to support his allegation that there was no negotiation and that this is a issue of fact to be decided by the jury. It is disturbing that appellant did not include in his direct quote from this case the next two sentences. The opinion goes on to say that although this would ordinarily be a question of fact, that in the absence of material issues of fact it was proper for the trial court to determine such fact as a matter of law. Appellee has not disputed any testimony given by appellant or Mr. Southworth given through affidavits or depositions concerning the scope of the negotiations.

The facts being undisputed, the outcome of this case turns on whether, in the words of the Court in *Bullis & Thomas* v. *Calvert,* 162 La. 378, 110 So. 621 (1926) as cited by the *Munson* Court, ". . . their negotiations with him progressed so far, at the time the contract expired, that he seemed then a likely purchaser. . . ." This is to be decided as a matter of law.

The Court in *Munson* relied upon, inter alia, 12 C. J. S., *Brokers,* § 88, p. 203, note 43, which lays down the following rule with respect to the meaning of the word "negotiation."

> "Negotiation," within the meaning of such a contractual provision, means efforts which so far interest a person that, at the expiration of the agency, he may be considered a likely buyer; it does not embrace the broker's mere offer to sell which is met with a prompt refusal and which has no effect on the subsequent sale.

According to the Affidavit of Shirley W. Southworth, the following negotiations occurred during the month of May, 1973:

> In May, 1973, . . . we went out to the farm. *I asked Mr. Parker if the farm was for sale. He said yes, and priced it to me at* $50,000, but he said that J. L. Murphy had had a contract to sell the farm but he thought his contract was out and that if it was out, *he might take* $48,500 *for the farm.* I was interested in helping Mr. Craig buy a farm.
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> Several days later, I called Charles Parker and told him that I did not know what Craig was going to do. I told him that Mr. Craig could not make up his mind. . . . *I told Charles Parker that I might buy the farm if I could get the money,* the next day I went down and left a check with Mrs. Parker for $1,000 to pay the pasture rent. The check was dated *May* 31, 1973. (R.18) (Emphasis added).

These "negotiations" occurred before the end of the exclusive right to sell contract period of July 2, 1973. It is reasonably inferred that Mr. Southworth may be considered a likely buyer. This conversation went beyond the mere fact of advising the prospective buyer that the land was for sale. In accordance with the definition of "negotiation" as expressed in C.J.S., "negotiation" is something more than an offer to sell and something less

than an express written contract to sell. The present case falls squarely within this limit and undoubtedly Mr. Southworth should be considered a "likely buyer."

CONCLUSION

Appellee respectfully submits that the Scott Circuit Court did not err in granting Summary Judgment for the reasons stated above; therefore, the judgment of the Scott Circuit Court should be affirmed.

Respectfully submitted,

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